

MEDICAL TERMINATION OF PREGNANCY OF CHILD RAPE VICTIMS : LAWS AND CHALLENGES

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Abstract

As per the 2019 annual report of the National Crime Records Bureau, rape is unfortunately, the fourth most common crime against women in India with 15% of the total victims being children, especially minor girls. Their young age, lack of knowledge and awareness thereof, makes them an easy prey. Due to this, most girls suffer in silence at the hands of the accused and they end up with unwanted pregnancies. Although, stringent legislations such as the POCSO Act, 2012 and The Medical Termination of Pregnancy Act, 1971 have been enacted to provide relief to child rape victims however unfortunately, there prevails a lack of implementation, which causes injustice to the victims. Thus, even though there are effective laws present, their lack of efficient implementation thereof, make them counterproductive.

This research paper aims to study the Medical Termination of Pregnancy Act, 1971 in consonance with POCSO Act, 2012 and POCSO Rules, 2020. It seeks to elaborately explain the basic provisions laid down in the Medical Termination of Pregnancy Act, 1971 and throw light on the recent amendments (Amendment of 2020) made in the Act and bring out the differences between the two legislations. It further discusses the legal procedure of filing a case under MTP Act, 1971 in case pregnancy is a late term pregnancy and the role of each stakeholder, as mentioned in the POCSO Act, 2012 and Rules, 2020. Lastly, the paper aims to list down and analyze the challenges that prevent the efficient implementation of the laws as well as suggest effective solutions to overcome challenges.

keywords : child, rape, pregnancy, termination, implementation.

INTRODUCTION

According to the 2019 annual report of the National Crime Records Bureau (NCRB) (hereinafter ‘the Report’), Rape is the fourth most common crime against women in India.² Despite enacting strong legal framework, the cases of rape continue to escalate. Out of the total 4,05,861 cases of crime against

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² National Crime Records Bureau, *Crime in India 2019* , Statistics. (1 Report, 2019).

women registered during 2019, 32,033 i.e. (7.9 per cent) were rape cases.³ What seems even more unfortunate is that out of the 32,033 reported victims in 2019, 15 per cent of the victims were children.⁴

The data pertaining to crime against children extracted from the Report, suggests that cases under the Protection of Children from Sexual Offences Act, 2012 (POCSO), including child rape constitute 35.3 per cent of the total reported 47,335 cases⁵, with highest number of cases under POCSO with 7,594 and 6,558 cases, being registered in the states of Uttar Pradesh and Maharashtra, respectively⁶.

Looking at these statistics, such commission of rape against minor girls, in most cases, leads to unwanted pregnancies⁷. Hence, it becomes pertinent to read the POCSO Act, 2012 and POCSO Rules, 2020 along with the Medical Termination of Pregnancy Act, 1971, while dealing with child rape cases.

RIGHT TO ABORTION : A CONSTITUTIONAL RIGHT

The Constitution of India, under Article 21, guarantees right to life and personal liberty. Over the years, the judiciary, by setting precedents, has widened its ambit of interpretation. The meaning of life, which was earlier attributed to mean only living existence, now attributes to mean living a dignified life with all its accompanying aspects like health, environment and so on.

The American case of *Munn v. Illinois*⁸, gave a comprehensive interpretation of the concept of life, and stated that the term 'life' means more than mere animal existence. The prohibition against its denial applies to all of the branches and faculties that allow one to enjoy life.

In the case of *Ashaben v. State of Gujrat*⁹ the Gujrat High Court, while pronouncing its decision interpreted rights of women, which includes the right to make reproductive choices, to be inclusive under Article 21 of the Constitution of India. The High Court held that the right to reproductive choices would include both the right to reproduce and the right to abstain from reproducing. The most important aspect is to respect a woman's right to privacy, dignity, and bodily integrity. This indicates that there should be no impediments on a woman's reproductive choices, such as her ability to avoid sexual activity or her insistence on using contraceptive measures.

³*Ibid.*

⁴*Ibid.*

⁵*Ibid.*

⁶*Ibid.*

⁷K.D. Gaur, 'Abortion and the Law in India' (1991)15 CULR 123–153.

⁸*Munn v. Illinois* (1877) 94 U.S. 113.

⁹*Ashaben v. State of Gujrat* (2015) 4 Crimes1 (Guj.)

Right to Abortion has also been recognized as a right of women under various International Conventions of Human Rights.

Rape is a heinous crime and it is not only considered an offence but it is also considered to be a contravention of the fundamental right of women, which is a part of right to life. According to the Supreme Court in *Suchita Srivastava v. Chandigarh Administration*¹⁰, a woman's ability to make reproductive choices is a dimension of personal liberty under Article 21 of the Constitution¹¹. The Supreme Court held in this case that it is important to recognize that reproductive choices can be used to procreate or abstain from procreating, and that the most important consideration is that a woman's right to privacy, dignity, and bodily integrity should be respected, which means that there should be no restrictions on the exercise of reproductive choices such as a woman's right refusing to participate in sexual activity or insisting on the use of contraceptive techniques.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

One of the first countries to allow abortion of pregnancy was India¹². Abortions were only made lawful in India under specific circumstances in 1971 by the Medical Termination of Pregnancy Act, 1971 (hereinafter "MTP Act"). The MTP Act is the chief law relating to the termination of pregnancies in India.¹³ The MTP Act was passed with the primary objective to provide for the lawful termination of pregnancies by registered medical practitioners under certain conditions only, as laid down by the Act.¹⁴

Section 3 (a) of the MTP Act prescribes the time limit in which termination of pregnancy is permissible. According to this section, a pregnancy can only be terminated where the period of pregnancy does not exceed 20 weeks and not after that. Under Section 3, for termination of pregnancy before 12 weeks, the opinion of only one medical practitioner is required. However, if the termination is to take place

¹⁰ *Suchita Srivastava v. Chandigarh Administration* [2009] 9 SCC 1

¹¹ The Constitution of India, Art. 21

¹² S.F. Jalnawalla, 'Medical Termination of Pregnancy Act: A Preliminary Report of the First Twenty months of implementation' (1974) 25(2) IJOG 588–592.

¹³ N.R.M. Menon, 'Population Policy, Law Enforcement and the Liberalisation of Abortion : A Socio Legal Inquiry into the Implementation of the Abortion Law in India' (1974) 16 JILI, 626, 632–633.

¹⁴ Asit. K. Bose, 'Abortion in India : A Legal Study' (1974) 16 JILI 535.

between the time period of 12 weeks to 20 weeks¹⁵, then at least 2 medical practitioners should be of the opinion that if the pregnancy is continued:

- the life of the woman would be in danger;
- her mental health would suffer as a result of the pregnancy or
- there is a risk of grave physical injury to her or
- there exists a significant risk that the if the child is born, he/she would suffer from such physical or mental abnormalities so as to be seriously handicapped for their lifetime.

CONSENT :

MTP is permissible and the pregnancy can only be terminated by consent. If the pregnant women is under 18 years, the consent of parents or guardian is necessary and if pregnant women is above 18 years, the consent of the pregnant women herself is essential. ¹⁶

MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021

The Medical Termination of Pregnancy (Amendment) Bill 2020¹⁷ was introduced in Lok Sabha by the Ministry of Health and Family Welfare on March 2, 2020. The Bill was passed by the Rajya Sabha in March 2021. The Amendment seeks to amend the Medical Termination of Pregnancy Act, 1971 which is about safe and legalized abortion.

The Medical Termination of Pregnancy (Amendment) Act 2020 seeks to bring about these important changes. Firstly, this Amendment seeks to increase the gestation period required for the abortion from 20 weeks to 24 weeks.¹⁸ Women who have foetal abnormalities that are identified after the 20th week can now medically terminate their pregnancy under these new provisions. With this increase in the upper gestational limit, combined with new medical technology, a woman can now have a safe and effective abortion. This abortion restriction applies only to rape survivors, incest victims, and women with major physical and mental health issues.

¹⁵ Mukesh Yadav, 'Is There Need for Danger to Health (Physical/Mental)/Life Ground of MTP beyond Permissible Limit in Exceptional Cases?' (2015) 37(4) J. Indian Acad. Forensic Med 334–337.

¹⁶ Medical Termination of Pregnancy Act, 1971, s 3(4).

¹⁷ Medical Termination of Pregnancy (Amendment) Bill, 2020

¹⁸ *Ibid.*

Secondly, the Amendment amends the need of one registered medical practitioner instead of two in case of termination of pregnancy with a gestation period of more than 20 weeks. The Medical Termination of Pregnancy Act 1971 specifies this in Section 3(2)(b). It adds a new provision requiring two or more qualified medical practitioners' advice before terminating a pregnancy with a gestation duration of 20-24 weeks¹⁹.

Thirdly, the Amendment has inserted a clause stating that the upper gestation limit will not be applicable if the Medical Board confirms a case of foetal abnormality.

Fourthly, the Amendment adds a Confidentiality clause which clearly mentions that the name and other information of the women whose pregnancy is terminated cannot be disclosed to anyone except for a authorized person of law.

Lastly, by the Amendment, the MTP has widened its ambit to provide services to a unmarried women who got impregnated due to failure of contraceptives. Such women will be given a choice to access safe abortion.

LEGAL PROCEDURE OF FILING A CASE UNDER MTP ACT, 1971 IN CASE PREGNANCY IS OF MORE THAN 24 WEEKS

The case is filed in the original jurisdiction of High Court , in case of pregnancy arisen out of sexual assault or rape or a Writ of Mandamus is filed. The Ministry of Law and Justice and Ministry of Health and Family Welfare are made Parties to the case. The High Court then passes an order for setting up medical board and submitting a report within 3 days. Lastly, upon the expert opinion of the Medical Board, the High Court passes final order²⁰.

COMPOSITION OF MEDICAL BOARD

Section 3 (2)(c) of the Act deals with the composition of the Medical Board. The Union or the State government has the power to formulate the Medical Board. According to this Section, Medical Board must consist of a Gynaecologist, a Paediatrician, a Radiologist/ Sonologist and any other member as the Court deems fit.

¹⁹ *Ibid.*

²⁰ Shradha Thapliyal, 'Abortion jurisprudence in the Supreme Court of India: Is it the woman's choice at all?' (*Center for Law and Policy Research*, 8 February 2019) <<https://clpr.org.in/blog/abortion-jurisprudence-in-the-supreme-court-of-india-is-it-the-womans-choice-at-all/>> accessed on 17 July 2021.

ROLE OF STAKEHOLDERS

Stakeholders are the authorities that are involved in and are responsible to aid the victims at every stage of the case. The Stakeholders involved while handling cases that fall under the ambit of POCSO and MTP Act include the Police, Child Welfare Committee (CWC), the Medical Practitioner and Social Workers/ Social Support Person. The following are the roles and duties of each stakeholder as prescribed under POCSO Act and Rules:

POLICE :

The first step taken by any victim is to file an F.I.R. with the Police or the Special Juvenile Police Unit (SJPU). Hence, the Police is the most important Stakeholder since they are the first to come in contact with the victim.²¹ According to Section 19 of the POCSO Act, the local police or the SJPU has the duty to record the FIR.²² As per Section 19(6) of the POCSO Act and POCSO Rule 4 (4), the Police or the SJPU must inform the CWC about the case within 24 hours in case the case fulfils any of the following conditions:

- Accused is living in the shared household or
- Child is in Child Care Institution or
- Child is without a home or parental support

The Police, according to POCSO Rule 4(14), has the duty to inform the child and the child's parents or guardian or any other person whom the child trusts about the entitlements and services available to them.

FORM A :

The Police has the duty to fill Form A²³ when such a case of child rape is registered. Form A explicitly lists down the following entitlements and services available to the children who has suffered rape and parents/guardian :

²¹Centre for Enquiry into Health and Allied Themes 'Understanding dynamics of sexual violence: Study of case records.' (2018) CEHAT & MCGM <<http://www.cehat.org/publications/1544166598> > accessed 17 July 2021.

²² Heidi Bart Johnston, 'Abortion Practice in India: A Review of Literature' (2002) Abortion Assessment Project - India, CEHAT

< <http://www.cehat.org/uploads/files/work1.pdf> > accessed 17 July 2021

²³ Medical Termination of Pregnancy Rules, 2003.

- To receive a copy of the FIR by the victim.
- To be provided with proper security and police protection.
- To be examined immediately and without charge by a civil hospital/PHC, etc.
- To obtain psychological and mental health counselling and advice.
- For the recording of a kid's statement by a female police officer at the child's home or any other location convenient to the child.
- To be transferred to the custody of a person in whom the child has faith if the offence occurred at home or in a shared household.
- On the proposal of the CWC, for immediate help and support.
- For being separated from the accused at all times, even throughout the trial.
- Having an interpreter or translator on hand, if necessary.
- Have a special educator or other specialist individual for the child if the child is impaired.
- In order to obtain free legal assistance.
- Child Welfare Committee will assign a Support Person.
- To continue with education.
- Confidentiality and privacy.
- For a list of important contact numbers, such as the District Magistrate's and the Superintendent of Police.

FORM B:

Police shall complete the Preliminary Assessment Form (Form B)²⁴ within 24 hrs of registration of FIR and submit to CWC. The Parameters of the Form are:

- Age of the Victim
- Relationship with the offender
- Type of abuse and gravity of offence
- Available details and severity of the mental and physical harm /injury suffered by the child.
- Whether the child is disabled
- Details regarding the economic status of the victim's parents, members of the child's family members, occupation of child's parents and monthly family income.

²⁴ *Ibid.*

- Whether the victim has undergone or is undergoing medical treatment due to the incident of the present case or is in need of such medical treatment.

CHILD WELFARE COMMITTEE:

Another important Stakeholder involved such cases is the Child Welfare Committee. The Child Welfare Committee is the final authority for exercising powers and carrying out obligations under the Act in relation to children in need of care and protection.²⁵ Section 30 of the Juvenile Justice (Care and Protection of Children) Act of 2015 states the functions of CWC :

- Monitor the work of various agencies of the State – the police, medical practitioners, judiciary, and child protection machinery that work together.
- Call for reports of the specific case falling within the jurisdiction of the CWC
- Help in the smooth functioning of medical procedures
- Look for the best interest of the child
- Monitor the implementation of the POCSO Act
- Make Recommendation to the DSLA

As mentioned above, the Police informs the CWC about a case within 24 hours, as per Section 19(6) of the POCSO Act and POCSO Rule 4 (4), in case the case fulfils any of the following conditions:

- Accused is living in the shared household or
- Child is in Child Care Institution or
- Child is without a home or parental support

The CWC has the duty to provide free legal aid under Form A. If a case involving any of the above given three conditions is brought to the CWC then, the CWC can either recommend to DLSA for immediate help to child or Assign support person.

MEDICAL PRACTITIONER:

As per Rule 6(4)(d) of POCSO, The registered medical practitioner rendering emergency medical care has to attend to the needs of the child, including possible pregnancy and emergency contraceptives

²⁵ National Commission for Protection of Child Rights, *Monitoring Guidelines for NCP/SCPCR for roles and functions of various stakeholders: Child Welfare Committees/Support persons and Health professionals* (Report 2018) Ch 13 and 14.

should be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence²⁶.

If the child is discovered to be pregnant, the registered medical practitioner must advise the child, as well as her parents, guardians, or support person, about the various legal options available to the child under the Medical Termination of Pregnancy Act 1971 and the Juvenile Justice (Care and Protection of Children) Act 2015.

The Medical Practitioners, have a duty to , as per POCSO Rule 6(4)(e), wherever necessary, provide a referral or consultation for mental or psychological health or other counselling to the victim.

Lastly, the Medical Practitioners also have a duty to collect Forensic evidence as per section 27 of the POSCO Act.

SOCIAL WORKERS/ SOCIAL SUPPORT PERSON :

In majority of the cases, the child as well as the Parents or Guardians are not aware of their legal rights and Procedures. Hence, the Child Welfare Committee appoints a social worker or social support person to aid the victim and inform them about their rights throughout the journey of their case.

CHALLENGES FACED IN THE IMPLEMENTATION OF MTP ACT :

Although, the MTP Act and its recent amendment prove to be progressive in their approach however, this legislation will only be able to provide justice if it is implemented accurately. Some challenges faced in the implementation of MTP Act are²⁷:

- **LACK OF KNOWLEDGE :** One of the pressing concerns of the Child Welfare Committee members was the prevalence of lack of knowledge on the laws of MTP amongst Stakeholders. One of the members mentioned that stakeholders such as the Police, Social Workers as well as the Medical

²⁶ Ministry of Health and Family Welfare, *Guidelines & Protocols: Medico-legal care for survivors/victims of Sexual Violence* (Report No. 20, 2013).

²⁷ Naushaiba Iqbal, 'Medical Termination of Pregnancy Act Failing Women Who Need It The Most.' (*IndiaSpend*, 22 October, 2019) < <https://www.indiaspend.com/medical-termination-of-pregnancy-act-failing-women-who-need-it-the-most/> > accessed 17 July 2021.

Practitioners are not aware of the laws of MTP. Since they themselves are not aware, they are not in a position to explain or give clarity to the victims/ clients upon the procedure to be followed.

In case of Police Officers, the training sessions conducted for them are attended by the Higher ranking officers and not the low ranking officers who actually deal with such MTP Cases.

Medical Practitioners are not aware of the procedures of MTP. They are not aware as to which authority to listen to. Medical Practitioners are under the false assumption that for every case of MTP, an order from the CWC is required. Hence, they do not carry out MTP without such order which causes further delay in termination of pregnancy²⁸.

Lastly, even Social workers appointed to aid the client/ victim during the entire case are unaware of the legal procedures. Hence, in case of any lapse in procedure or in case of any lack of communication amongst Stakeholders, the social worker is unable to provide rational solutions to take the case forward.

▪ **DELAY CAUSED BY STAKEHOLDERS** : Another pertinent challenge faced by the members is the delay caused by the Police in informing the victim and the family about their available rights and also the delay caused by the Police in informing the CWC resulting in further delay. Similarly, Medical Practitioners also cause undue delay while awaiting an order by the CWC before carrying out MTP, which is not even required.

▪ **MTP ACT NOT EXHAUSTIVE** : The MTP Act is limited to the extent of providing the victim with judicial aid. The Act remains silent on social issues such as methods of rehabilitation of the women in the society. Moreover, the MTP Act also does not specify the role assigned to Child Welfare Committee in case of Minor seeking relief under the Act . Lastly, the Act is also silent about the procedure if after the termination procedure, the child is born and survives.²⁹

▪ **LACK OF CLARITY REGARDING CONSENT** : Challenges faced on giving consent. There is lack of knowledge regarding who can give valid consent if a minor is pregnant and what should be done if Parents/ guardian and pregnant women do not agree to one decision.

²⁸Padma D. & Sangeeta R. 'Rape survivors' right to abortion: Are doctors listening?' *The Wire (India)*, 8 September, 2017).

²⁹ Padma D & Sangeeta R 'Denial of Safe Abortion to Survivors of Rape in India' (2019) 21(2) HHR, 189–198.

- **COERCION OF PREGNANT WOMEN:** Pregnant woman is pressurized by the family to terminate pregnancy.³⁰

ACTION PLAN TO OVERCOME CHALLENGES:

The Medical Termination of Pregnancy Act of 2021 offers a new glimmer of hope for women who wish to get safe abortions and want to lawfully end their pregnancies. Only when these shortcomings of implementation are removed, will the victims be able to enjoy the remedies available to them completely. Hence, in order to overcome the challenges listed above, the following action plan must be taken :

1. The Stakeholders must be made aware of the laws and procedures regarding MTP. All stakeholders must communicate amongst one another to ensure proper implementation of the law and provide justice.
2. There is a pressing need to sensitise stakeholders, especially Police Officers towards the victims and to make these cases a priority, due to their time sensitive nature and not cause any delay³¹.
3. In case of conflict regarding consent between pregnant woman and parents/ guardians, where the pregnant women is still a minor, the CWC must intervene and take a decision keeping in mind all other related factors such as age of the victim, the financial status etc.
4. The CWC must ensure that the consent for termination must be given voluntarily without undue influence.
5. For this legislation to be implemented effectively, they need to be backed by political will and commitment in terms of adequate resource allocation, training and infrastructure support, accompanied by social inputs based on women's needs.³²

CONCLUSION

³⁰T. K. Sundari Ravindran, & Balasubramanian, P ‘ “Yes” to Abortion but “No” to Sexual Rights: The Paradoxical Reality of Married Women in Rural Tamil Nadu, India’ (2004). 12(23) *Reprod. Health Matters* 88-99.

³¹ Namrata Solanki, ‘Critical Analysis of Law relating to Late-Term Abortions of Child Rape Victims.’ (2018). 1DJCL 21–29.

³² S.S Hirve, ‘Abortion Law, Policy and Services in India: A Critical Review’ (2004) 12(24) *Int. J. Sex and Reprod. Health and Rights*.

The MTP Act is a revolutionary piece of legislation that has provided Indian women a sense of reproductive autonomy and rights. At a time when several countries are striving to repeal medical termination regulations, India has managed to keep and develop the law around medical termination. The Amendment of 2021 attempts to amend and introduce certain provisions which can be beneficial. However, women will only be able to reap its benefits when such a progressive legislation will be implemented effectively and efficiently. Therefore, it becomes pertinent to overcome these legislative challenges and shortfalls and for the Stakeholders to become aware and perform their duties responsibly. Only when we ensure the smooth implementation of the law will victims be able to claim relief.